United States Court of Appeals

for the Second Circuit

APPENDIX

75-2151

To be argued by:
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES KAYLOR,

Petitioner-Appellant.

-against-

UNITED STATES OF AMERICA,

Respondent-Appellee.

Docket No. 75-2151

B
P/S

APPENDIX TO THE BRIEF
FOR PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Petitioner-
Appellant JAMES KAYLOR
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
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JONATHAN J. SILBERMANN,
Of Counsel.

4

PAGINATION AS IN ORIGINAL COPY

Sheet #1

C. 105 40 1292 SECT. APPEAL

DOCKET

TITLE OF CASE

In the Matter of the Application of

United States of America

v.

James Naylor

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ATTORNEYS

For Plaintiff: James Naylor
Pro Se 79009-158
P.O. Box 1000
Lewisburg, PA. 17837
(Appointed by Court:
For Defendant: THE LEGAL AID
SOCIETY
26 Court St., Room 701
Brooklyn, N.Y. 11242
For Defendant:

ASIS OF ACTION: Pursuant to Sec. 2255
(Related Case: 72 CR 1210)

URY TRIAL CLAIMED
N

DATE	PLAINTIFF'S ACCOUNT	RECEIVED		DISBURSED		DATE	DEFENDANT'S ACCOUNT	RECEIVED		DISBURSED	
-6-7	EOPHA PAUPERIS	--	--								

ABSTRACT OF COSTS

TO WHOM DUE	AMOUNT	

RECEIPTS, REMARKS, ETC.

74C 1202 IN THE MATTER OF... U.S.A. v. JAMES KAYLOR

ONLY COPY AVAILABLE

DATE	FILINGS--PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS	
9-6-74	MOTION FILED TO VACATE SENTENCE. (Re: 72 CR 1210)	1	JS5
9-17-74	BY NEAHER, J.--ORDER TO SHOW CAUSE (dated 9-16-74) FILED Ordered that the U.S. Attorney for the E.D.N.Y. show cause why the relief requested should not be granted, by the filing of a return to the petition. Service of a copy of this order shall be made by the Clerk by delivery of a copy together with a copy of the petition to the U.S. Attorney, and by mailing a copy of this order to the petitioner.	2	
10-7-74	GOVERNMENT'S MEMORANDUM OF LAW FILED.	3	
10-24-74	TRAVERSE FILED TO GOVERNMENT'S MEMORANDUM OF LAW.	4	
11-8-74	GOVERNMENT'S MEMORANDUM OF LAW FILED in reply to petitioner's traverse.	5	
11-8-74	Affidavit of Michael J. Gillen, Esq., filed.	6	
11-29-74	Affidavit of James Kaylor filed in response to the affidavit filed by Michael J. Gellen, etc.	7	
12-5-74	Copy of letter of NEAHER, J. addressed to Simon Chrein, Esq., Legal Aid Society, etc. , that The Legal Aid Society is appointed herein as counsel, etc.	8	
12-5-74	BY NEAHER, J: MEMORANDUM ORDER FILED. ORDERED that the Legal Aid Society be assigned to represent petitioner pursuant to the provisions of the Criminal Justice Act and that copies of this order be mailed by the Clerk to the Legal Aid Society, attention Simon Chrein, Esq., to the U.S.Atty., for this District, and to petitioner James Kaylor, etc. (See Memo., etc.)	9	
12-5-74	Copy of letter of Clerk of Court filed dated Dec.5,1974 re enclosure of a copy of memo., etc., cc with enclosure to Legal Aid Society, etc.	10	
2-14-75	Letter of relator herein filed dated Feb. 11, 1975 addressed to this office, etc. (See notation on this letter stating that Legal Aid will write to J.Kaylor informing him of status of his case.)	11	
3-6-75	BY NEAHER, J. ORDER FILED Ordered that the Superintendent of Lewisburg, Pa., Federal Detention Facilities, etc., release relator herein into the custody of the U.S. Marshal; Ordered that the U.S. Marshal transport him to N.Y.C., etc., and that the Superintendent of the Federal House of Detention at West St., take custody from the U.S. Marshals and detain him at that facility until further order of this court Certified copies issued to the U.S. Marshal.	12	

CIVIL DOCKET JAMES TAYLOR

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DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	A REPO EMO RE
4-4-75	Memorandum of Law filed.		13	
4-7-75	Memorandum of Law filed for the petitioner.		14	
4-22-75	BY NEAHER, J. ORDER filed that the Superintendent of the Federal Reformatory at El Reno, Lklahoma, release Willie Glen Hopkins into the custody of the U.S. Marshals; and it is further ORDERED that the U.S. Marshals take custody at the Federal Reformatory at El Reno, on or before May 2, 1975, etc. (See Order) P/C mailed to attys. mp		15	
5-1-75	Memorandum filed.		16	
5-19-75	BY NEAHER, J. ORDER FILED. The Court has set Monday, July 7, 1975 at 10:00 A.M. as the time for an evidentiary hearing to explore the questions, etc., SO ORDERED. (See Order)		17	
5-20-75	Copy of letter of Clerk of Court filed dated May 20,1975 re enclosure of a copy of memo., etc., cc: U.S.Atty., etc.		18	
5-22-75	Affidavit of WILLIE GLEN HOPKINS, filed.		19	
7/3/75	By NEAHER,J.- Order filed that Marshal serve subpoena duces tecum on Paul Gannon, Clerk of the Brooklyn House of Detention, etc.		20	
7-11-75	Before NEAHER, J.--Case called. Deft & counsel present. Evidentiary hearing begun. Hearing continued to 7-17-75 at 3:30 PM.			
7-17-75	Before NEAHER, J. Case called. Petitioner present with counsel. Hearing resumed. Hearing concluded. DECISION RESERVED.			
9/2/75	Stenographer's transcript of July 11, 1975 and July 17, 1975 filed.		21	& 2
9-9-75	Vouchers re payment ($240.00) filed. (Re: Copy 2 and 5)		23	& 2
9-9-75	Vouchers 1 and 4 mailed to Administrative Office, etc.			
9-9-75	Copy 3 mailed to U.S. Court Reporters, E.D.N.Y.			
9-26-75	Government's Post Hearing Brief filed.			25
10-3-75	Petitioner's supplemental memorandum of law filed.			26
11-24-75	BY NEAHER, J. MEMORANDUM ORDER FILED. Petitioner-s motion to vac his sentence is DENIED. SO ORDERED. The court wishes to express thanks to Jonathan J. Silbermann, Esq., of the Legal Aid Society for his able representation of petitioner in this matter. (See Mem			
11-25-75	Copy of letter of Clerk of Court filed dated Nov. 21, 1975 addressed to The Legal Aid Society, etc. cc: U.S.Atty., E.D.N.Y.			2
11-26-75	JUDGMENT dtd 11-26-75 filed (mg)			2
12-2-75	Notice of appeal filed. Copy mailed to C of A and US ATTY, EDNY.			3
12-11-75	D. C. 110 CIVIL APPEAL SCHEDULING ORDER			31
12-22-75	Affidavit of JAMES TAYLOR			32
12-22-75	Stipulation and order, etc.			33

CERTIFIED COPY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - -x

JAMES KAYLOR, :

74 C 1292

Petitioner, :

-against- : MEMORANDUM AND ORDER

UNITED STATES OF AMERICA, :

Respondent. :

- - - - - - - - - - - - - - - - - - - -x

APPEARANCES:

WILLIAM J. GALLAGHER, ESQ.
The Legal Aid Society
Federal Defender Services Unit
Attorney for Petitioner
By JONATHAN J. SILBERMANN, ESQ.

DAVID G. TRAGER, ESQ.
United States Attorney,
Eastern District of New York
Attorney for Respondent
By DAVID S. GOULD, ESQ. and
SAMUEL H. DAWSON, ESQ.
Assistant U.S. Attorneys

NEAHER, District Judge.

Petitioner filed this motion pursuant to 28 U.S.C. §2255 to vacate a sentence of ten years imprisonment imposed after he was found guilty by a jury of theft from interstate commerce. Petitioner's conviction was affirmed by the Court

(27)

of Appeals, United States v. Kaylor, 491 F.2d 1127 (2 Cir. 1973), and he is presently serving that sentence.

Petitioner was convicted of participating in the hijacking on July 20, 1972 of a tractor-trailer which was carrying beef from Nebraska to Queens, New York. At trial, counsel stipulated that the only issue for jury determination was the identity of petitioner as one of the hijackers.

The strongest evidence against petitioner on this point was the testimony of Carl Wolverton, the driver of the hijacked vehicle. Wolverton positively identified petitioner as one of the hijackers. Two butchers, Charles Simonian and Nicholas Stolfi, testified that they discussed the purchase of meat with a man called "Shorty" on July 21, 1972. Both men, however, testified that petitioner was not "Shorty." Henry Stanech, a New York City police officer, testified that petitioner admitted to him on December 14, 1972 that his nickname was "Shorty." There was also testimony from Special Agent Allen Garber, who headed the investigation for the Federal Bureau of Investigation, that after petitioner was informed of being indicted for the hijacking he said that "If I get uptight enough about this case I can tell you about it."

On this motion, petitioner urges two grounds for vacating his sentence: (1) that he was denied the effective assistance of counsel, and (2) that during the trial he was subjected to an impermissible in-court identification, i.e., Wolverton's. In support of his first ground, petitioner maintains that his court-appointed counsel erred in (1) suggesting he plead guilty, (2) advising him not to take the stand in his own behalf, (3) failing to discuss the case with him prior to trial and consequently being unprepared, and (4) refusing to allow his wife, Mrs. Bernice Kaylor, to testify as to an alibi defense.

The factual contentions underlying the alibi-defense claim were that petitioner had been with his wife the night of the hijacking, that she had told petitioner's counsel during the trial that she would so testify and that counsel had ignored the offer.

Because factual questions were raised by the petition necessitating an evidentiary hearing, the court appointed the Legal Aid Society to represent petitioner and a hearing was held on July 11 and 17, 1975. The following represent the court's findings of fact and conclusions of law. Rule 52(a), F.R.Civ.P.

I.

At the hearing, petitioner's trial counsel, Michael J. Gillen, Esq., testified that he has been an attorney since 1956, had been an Assistant United States Attorney from 1961 to 1968 and had handled many hijacking cases, including 20 to 30 which actually went to trial. He recalled meeting with petitioner at the Brooklyn House of Detention but could not remember if it was before, during or after the trial. After the trial, he was in contact with petitioner and his family and until this petition was filed no one had mentioned to him the possibility of an alibi defense. He stated that he always checked out alibi defenses when raised and that Mrs. Kaylor never told him during the trial that she could alibi petitioner, although she was present during the trial.

Further, Gillen testified that he did discuss a plea with petitioner but did not promise him a shorter sentence if he pleaded because he was aware that sentencing was entirely within the judicial province.

Willie Glen Hopkins, petitioner's nephew and convicted co-defendant, testified that petitioner did not

participate in the actual hijacking. He admitted his own participation, aided not by his uncle but by two men, one of whom closely resembled his uncle and who was also nicknamed "Shorty." He had met these two men, whose names he did not remember, at a bar the night of the hijacking and they decided then and there to hijack the truck. He had never seen them before that night. Either during or after the trial, he did not tell anyone, except possibly his aunt, that his uncle had not participated in the hijacking.

Mrs. Kaylor testified that she spoke to Gillen during the trial in the hallway outside the courtroom and told him she "could tell him where James [petitioner] was on the particular day" (Tr. 66). According to her, Gillen said he would talk to petitioner about her testifying but never said anything else about it.

The substance of her alibi testimony would have been that she and petitioner had gone to the movies on the night of July 20, 1972, and had thereafter gone home, eaten and gone to sleep. She admitted that she and petitioner had separated in May of 1972 and she did not remember what movie they saw that night.

Although Mrs. Kaylor said she talked to Gillen on the phone before the trial she did not mention the alibi at that time. Moreover, she admitted she never told Gillen that they had been to the movies that night; she merely told him "I could testify as to where we were " (Tr. 85). Nor did she try to communicate this valuable information to Gillen at any time after the trial even though both she and Gillen were present at the time petitioner was sentenced.

Kenneth Kaplan, the Assistant United States Attorney who tried petitioner, testified that Gillen never told him he was going to try to get petitioner to plead guilty nor was any possible alibi brought to his attention.

Petitioner took the stand and testified that shortly before the trial he met with Gillen in the courthouse jail and told him that he was not involved in any hijacking. At that time, he also told Gillen that his wife could alibi him. According to petitioner, Gillen then said, "I'll see," and walked away.

Petitioner also testified that he first discussed with his wife their having been at the movies the night of July 20, 1972 during a visit in the courthouse detention cell

in January 1973. At that time, she asked him if he had told Gillen that they had been to the movies on the night of the hijacking and he replied that he had not — although he did tell her that he had told Gillen she could alibi him. In fact, Kaylor never told Gillen that they had been to the movies, either before, during or after the trial. Nor did he tell Frank A. Lopez, an attorney he contacted in an attempt to have him handle his appeal, that he had an alibi.

The law in this circuit is clear. In order to succeed on his Sixth Amendment claim, petitioner must show

> "that counsel was both grossly incompetent, and that 'the essence of a substantial defense' was thereby blotted out. United States ex rel. Testamark v. Vincent, 496 F.2d 641, 643 (2 Cir. 1974), cert. denied, 95 S.Ct. 1585 (1975) . . . ." United States ex rel. King v. Schubin, ___ F.2d ___ (2 Cir. 1975).

Assuming, without deciding, that petitioner's alibi defense would have been substantial if introduced at trial, petitioner is still entitled to no relief because the court finds that his counsel was never apprised of the existence of any possible alibi. The court is impelled to this conclusion after assessing the credibility of the witnesses and drawing inferences from what was and was not done by the

various parties involved.

Initially, the court finds it difficult to believe that if a viable alibi existed, petitioner and his wife would have treated the matter as casually as they apparently did. Mrs. Kaylor, according to her own testimony, never told Gillen that she and her husband went to the movies the night in question; she testified she merely told him she knew where he was — an ambiguous statement at best.[1] Nor did she press Gillen concerning this most important matter, either during or after the trial, even though she was present throughout the trial and at sentencing and communicated with Gillen after the trial. Finally, she did not mention the alibi to Gillen when she spoke with him on the phone prior to trial.

Similarly, petitioner did not press Gillen about this alibi during or after the trial; nor did he request that Gillen be relieved. He also did not mention it to Lopez, the attorney he contacted to handle his appeal. In fact, petitioner did not raise the alibi defense until he filed this §2255 motion, approximately one and a half years after his trial. It strains credulity to believe that a matter of this

moment was never urged before, during or shortly after the trial, and compels the court to find that it was a recent fabrication manufactured to lend factual support to petitioner's legal contentions.

Additionally, while a general reputation for competence is not conclusive as to performance in a specific case, the fact that petitioner's trial counsel was experienced in the handling of criminal cases, having been an Assistant United States Attorney for seven years and defense counsel for five years at the time of petitioner's trial, is certainly relevant on the question of his performance in any specific instance. It also supports the conclusion that he was never informed of any alibi defense.

Petitioner's other claims of counsel error are also without merit. The court finds, based on the credible evidence, that Gillen did not attempt to coerce petitioner into pleading guilty. Even if he suggested a guilty plea, that would be a matter of strategy and could not form a basis for relief in this court. United States v. Garguilo, 324 F.2d 795, 796 (2 Cir. 1963). See also United States v. Matalon, 445 F.2d 1215, 1218 (2 Cir. 1971).

Similarly, the decision not to put petitioner on the stand is committed to counsel's discretion and is not reviewable here. Cf. United States ex rel. Crispin v. Mancusi, 448 F.2d 233, 238 (2 Cir. 1971). Moreover, in view of petitioner's prior record,[2] it is certainly arguable that advising him not to take the stand was a prudent course to follow. See id.

Petitioner's claim that trial counsel was unprepared is wholly without merit. The transcript of the trial and testimony in this proceeding reflect that petitioner's counsel conducted his defense in a well-prepared and competent manner.

II.

The government urges that petitioner is barred from raising the identification issue here because that question was before the Court of Appeals on direct appeal and decided adversely to him. Petitioner, however, points out that the identification issue was raised on appeal, not by him, but by his co-defendant, Willie Glen Hopkins, who was also the subject of Wolverton's in-court identification, and consequently the issue was not both "raised and considered

on the appeal," Castellana v. United States, 378 F.2d 231, 233 (2 Cir. 1967), as to petitioner.

Here, however, the trial court held a hearing and then permitted Wolverton to make the in-court identification. It would be inappropriate for this court to review that decision, having been made by a court of coordinate jurisdiction.

Moreover, while it is true that the identification issue was not raised by petitioner in the Court of Appeals, it seems clear from that court's opinion that the identification question was considered as to both defendants.

> "Here the witness, after he left the stand, volunteered to Detective Flynn that he had recognized the appellants as the hijackers. The court quite properly conducted a hearing in the jury's absence to determine whether there were taint by virtue of the viewing of the defendants for the first time in the courtroom, and satisfied itself that the witness was 'forthright' and his testimony positive. He had had, he had previously testified, a minute and a half to see the hijackers at the time of the robbery, and his description of the appellants was accurate." 491 F.2d at 1132 (emphasis supplied).

Under these circumstances, the court is of opinion that the identification issue is foreclosed.[3]

The court has considered other claims raised by petitioner and found them also to be without merit.[4]

Accordingly, petitioner's motion to vacate his sentence is denied.

SO ORDERED.

The court wishes to express its thanks to Jonathan J. Silbermann, Esq., of the Legal Aid Society for his able representation of petitioner in this matter.

Edward R. Neaher
U. S. D. J.

Dated: Brooklyn, New York
November 24, 1975

F O O T N O T E S

1 It is also noteworthy on the issue of petitioner's credibility because petitioner stated in his verified petition that:

> "Once when my wife was present he made his remark 'How can you refuse [sic] them?' and my wife, Mrs. Bernice Kaylor told him, 'I will take the stand and refute them in most if not all, of their allegations,' and my court attorney vetoed the idea, refusing to talk any further in regard to her taking the stand in my defense." Petition at 4a.

This varies markedly from Mrs. Kaylor's testimony that the conversation took place in the hallway and in petitioner's absence. Both versions are contradicted by Gillen's testimony that Mrs. Kaylor never said she could refute the government's witnesses (Tr. 19). The court chooses to credit Gillen's testimony.

2 Petitioner had a prior criminal record involving larceny, weapons possession, burglary and grand larceny of a tractor-trailer.

3 It is thus unnecessary to determine whether petitioner "deliberately bypassed the orderly federal procedures . . . by way of appeal . . . ." Kaufman, supra, 394 U.S. at 227 n. 8.

4 In his original petition, petitioner asserted a claim of entrapment. This claim is unsupported by any factual allegations and, in any case, is wholly frivolous in view of the fact that the theory of his defense was that he was not a participant.

Additionally, petitioner claimed he was denied a fair trial because of undue participation by the trial

judge. This claim was raised and rejected on direct appeal, United States v. Kaylor, supra, 491 F.2d at 1130, and cannot be relitigated here. Castellana, supra.

tent to convert to their own use a tractor trailer traveling in interstate commerce and they appealed. The Court of Appeals, in an opinion by Oakes, Circuit Judge, who dissented in part, held, inter alia, that defendants were not deprived of fair trial by trial court's questioning of witnesses, that there was sufficient evidence to support indictment, that there was no error in admitting evidence of a pretrial photographic identification of defendants, that there was no error in allowing introduction of certain admissions of defendant, that there was no error in permitting witness to retake stand to make an in-court identification for the first time and that there was a sufficient implied finding that defendant would not benefit from sentence under Youth Corrections Act.

Affirmed.

On rehearing 2 Cir., 491 F.2d 1133.

1. Criminal Law ⇐658(2, 5)

Where prosecution witnesses, who had made photographic identification testified at trial that defendant resembled or looked like the person witnesses had talked to but was not, court's inquiry of witnesses to determine in what respect their memories of appearance of person they did see differed from that of defendant in court, and court's statement that it was obvious that the witnesses were nervous or afraid without indicating any belief as to why did not overstep court's duty to clarify ambiguous questions and testimony for jury and to insure fair trial.

2. Indictment and Information ⇐192(11).

Evidence of prosecution witnesses identifying defendant as "Shorty" from photographs was sufficient to warrant defendant's indictment on charge of hijacking in light of testimony before grand jury that "Shorty" had offered to sell meat in hijacked trailer since this evidence indicated reasonable probability that the crime of hijacking had been committed by [illegible]

UNITED STATES of America, Appellee,

v.

James KAYLOR and Willie Glen Hopkins, Appellants.

No. 1048, Docket 73-1330.

United States Court of Appeals, Second Circuit.

Argued July 17, 1973.

Decided Oct. 15, 1973.

By judgment of the United States District Court for the Eastern District of [illegible] Judge Frankel, J., defendants were convicted of stealing with in-

3. Larceny ⇐64(1)

Participation in a theft may be inferred from possession of recently stolen goods.

4. Criminal Law ⇐339

Trial court properly allowed testimony of both witnesses at trial who had made a prior photographic identification of defendant but who did not identify defendant at trial where there is no indication that there was an impermissible suggestiveness in the photographic identification procedure.

5. Criminal Law ⇐412.2(4)

Statements made by defendant to FBI special agent after proper warnings of constitutional rights, one of which was made prior to time defendant asked for an attorney and the second of which was volunteered after the special agent had concluded background information interview, were admissible in prosecution notwithstanding absence of counsel.

6. Constitutional Law ⇐266(3)
Criminal Law ⇐339

A "show-up" is not per se inadmissible or violative of due process and the admissibility of identification in such procedure depends on the totality of circumstances.

7. Criminal Law ⇐1166.11

In absence of any suggestion that prosecution was in any way attempting to bring confrontation about in the fashion that it occurred, there was no reversible error in permitting driver of hijacked truck who gave testimony and was excused from returning to the stand, to identify defendants as persons involved in hijacking, where driver volunteered to detective after his testimony that he had recognized defendants as hijackers and court after hearing determined that identification testimony was not tainted by witness' view of defendants in courtroom. 18 U.S.C.A. § 659.

8. Infants ⇐69

Merely an implicit finding that defendants would not derive benefit from treatment under the Youth Corrections Act is sufficient to authorize court to sentence defendant otherwise than pursuant to such Act where there is a sufficient record. 18 U.S.C.A. § 5010(d).

9. Infants ⇐69

Statements of trial judge before verdict that he always took youth offender eligibility into consideration when sentence is imposed and that in imposing sentence court had taken into account fact that defendant was quite young at time he committed crime were sufficient to constitute an implicit finding that defendant would not derive benefit from treatment under the Youth Corrections Act. 18 U.S.C.A. § 5010(d).

10. Criminal Law ⇐986

Trial court did not err in failing to consult with sentencing panel operative in the Eastern District of New York with respect to imposition of sentence since the functioning of nonsentencing judges was purely advisory.

Michael J. Gillen, Brooklyn, N. Y., for appellant Kaylor.

Mark A. Landsman, Brooklyn, N. Y. (Lawrence Stern, New York City, of counsel), for appellant Hopkins.

Kenneth J. Kaplan, Asst. U. S. Atty. (Robert A. Morse, U. S. Atty. E. D. N. Y., L. Kevin Sheridan, Asst. U. S. Atty.), for appellee.

Before MOORE and OAKES, Circuit Judges; GURFEIN,* District Judge.

OAKES, Circuit Judge:

This appeal arises out of convictions for the theft of a tractor-trailer containing a shipment of 49 head of hung beef valued on July 20, 1972, the time of the theft, at $22,000. The convictions were on a substantive count of stealing, with intent to convert to appellants' own use (18 U.S.C. § 659), the tractor-trailer, which was traveling in interstate commerce from Dakota City, Nebraska, to

*Hon. Murray I. Gurfein, United States District Judge for the Southern District of New York, sitting by designation.

the Jamaica Wholesalers in Jamaica, Queens. Appellant Kaylor was sentenced to a term of imprisonment of ten years and appellant Hopkins to one of seven years.

Appellant Kaylor claims that the trial court's conduct deprived him of a fair trial, that there was not competent evidence before the grand jury identifying him so as to support an indictment, that the trial court erred in not suppressing the testimony of two witnesses who refused to identify him in court and that the trial court improperly received in evidence certain admissions by appellant. Appellant Hopkins argues that an in-court identification of him by the driver of the tractor-trailer was tainted by the fact that it had occurred after the witness had testified and when he was recalled after having seen appellant at the counsel table, and that the court erred in refusing to sentence appellant pursuant to the Youth Corrections Act and in refusing to consider possible recommendations of the sentencing panel which is operative in the Eastern District of New York.

Carl Wolverton, over-the-road tractor-trailer driver, was the lucky fellow who arrived in Jamaica with the 49 beef carcasses all the way from Dakota City, Nebraska. He parked his truck, and at about 11 o'clock that night went for a few minutes to get a sandwich. When he returned to the truck, as he was about to "pick a little" at his guitar and lock the door to the cab, someone opened it, pointed a gun at his head and told him to get in the bunk at the back of the cab. One man held a gun in his ear and a second tied his arms and legs with rope and subsequently put white tape over his eyes and over the top of the rope. One of them roughed him up by hitting him "a few good clips" with the gun on his head, and after being driven around for a couple of hours and stripped to his underwear, Wolverton was thrown out of the cab of his tractor like a "sack of taters" into a Dodge van, and then hit, kicked and urinated upon. He was abandoned in the van and worked himself free during the following morning.

The Dodge van had been stolen in Brooklyn the morning of the hijacking, and when found, the inside of the left front door bore the fingerprints of the appellant Hopkins. About 7:00 a.m. an alert New York City detective, John Flynn, saw a tractor-trailer at Hegeman and Logan Streets in Brooklyn and began to follow it, his suspicions aroused. He stopped it and asked for and received identification from the driver, but still was suspicious, so he followed the truck to a meat market. There five men in butcher's jackets were directing the vehicle into an alleyway. At this point Flynn called for assistance and proceeded toward the vehicle when the two people in the tractor-trailer broke and ran. Sure enough, the tractor-trailer turned out to be Wolverton's with the Dakota City load of beef. At trial Flynn identified appellant Hopkins as the helper he had observed in the truck. The other individual, the driver of the truck, has, however, never been apprehended.

The proprietors of the meat market to which the truck was being delivered were Charles Simonian and Nicholas Stolfi. While the tractor-trailer was approaching the entrance of the meat market, Simonian was standing at the back with an individual he knew as "Shorty," which also happens to be a nickname for appellant Kaylor. This individual was black and described by Simonian as about 5' 5" to 5' 8" with a stocky build and short cropped hair, 30 to 35 years old, and having no beard or moustache. "Shorty" had been around before to see if these butchers wanted to buy some meat. On that very morning "Shorty" had telephoned Simonian and told him that he had some meat for him, and the two had met in a luncheonette a few doors down the street and gone to the meat market when Simonian opened it. Simonian did not want the whole trailer load of meat because it was "too much."

Before the grand jury both Simonian and his partner, Stolfi, identified a pic-

ture of James Kaylor as the man they knew as "Shorty" when they were shown a spread of photographs. This picture of Kaylor, like their description of "Shorty," was of a man without a moustache or a beard. At the time of trial, however, while both of the butchers thought James Kaylor "looked like" or "resembled" "Shorty," they stated that Kaylor was not "Shorty." At the time of trial Kaylor had grown a moustache and beard, had longer hair and puffier cheeks and was somewhat heavier than the "Shorty" that he "looked like" or "resembled."

On December 15, 1972, after a special FBI agent had warned Kaylor of his constitutional rights, Kaylor told him that "If I get uptight enough about this case I can tell you about it," and that "I know about those two guys in the meat market and they should never have paid the police the $500."

At the trial, the tractor-trailer driver, Wolverton, appeared but during his original testimony was not asked whether he could identify either of the two defendants. When he left the stand, however, he went back to the witness room and told Detective Flynn that he could identify the hijackers. Before permitting him to testify, the court held a hearing on suggestiveness out of the presence of the jury and found that no impropriety or suggestiveness had occurred. The witness was permitted to retake the stand in the presence of the jury and he then identified the two defendants as the hijackers.

[1] We have examined the record with some care in the light of United States v. Friedgoog, 69 Crim. 102 (E.D. N.Y., Dec. 1, 1972) (Rosling, J.), remanded, No. 73-1122 (2d Cir., Apr. 25, 1973) (mem.) and United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973). We do not find that the trial judge overstepped his duty "as more than a moderator to clarify ambiguous questions and testimony for the jury and to insure that the trial was fairly conducted." *See* United States v. Pellegrino, 470 F. 2d 1205, 1206 (2d Cir. 1972), cert. denied,, 411 U.S. 918, 93 S.Ct. 1556, 36 L. Ed.2d 310 (1937). *See also* United States v. Boatner, 478 F.2d 737, 740–741 (2d Cir. 1973). Appellant Kaylor's principal complaint is directed toward the interrogation by the court of the witnesses Simonian and Stolfi after their testimony that Kaylor resembled or looked like the "Shorty" they talked to, but was in fact not him. The court, quite correctly, we think inquired of the witnesses to determine in what respects their memories of the appearance of the "Shorty" they did see differed from that of the defendant Kaylor in court, especially since the photographic identification they had made was of a photograph of the appellant himself. True, the court referred to "the Shorty in the courtroom" but there was subsequent testimony by a New York City police officer that he had asked appellant Kaylor if his name was "Shorty" and Kaylor had replied that he was known by that name. The court did remark about the witness Stolfi's obvious nervousness *after* he had told the prosecutor he was "very, very nervous" and defense counsel had accused the prosecution of trying to inject "something of fear" into the case. All that the court did was to say that it was obvious that the witness was nervous or afraid, since he was stuttering, repeating himself and hesitating to answer, without in any way indicating any belief as to why the witness was afraid. Lastly, the court's inquiry of Stolfi whether his butcher shop was still in the neighborhood and whether his number was in the phone book would give some explanation for the witness's nervousness, perhaps, but would not necessarily point toward appellant; as any trial judge knows, many witnesses are nervous especially when testifying in a case involving violence. It does not have to be the defendant who frightens the witness; indeed, if in fact there were another "Shorty" as appellant Kaylor claims, then the witness might have been fearful because he did *not* identify the appellant as "Shorty." In any case, the witness's fear was relevant.

[2, 3] Suffice it to say that the evidence of Simonian and Stolfi identifying Kaylor as "Shorty" from photographs was sufficient to warrant Kaylor's indictment in light of the testimony before the grand jury that "Shorty" had offered to sell the meat in the hijacked trailer. This evidence indicated a "reasonable probability" that the crime of hijacking had been committed by Kaylor, and that is enough to warrant an indictment. *See* Carrado v. United States, 93 U.S. App.D.C. 183, 210 F.2d 712, 717, cert. denied sub nom. Atkins v. United States, 347 U.S. 1018, 74 S.Ct. 874, 90 L.Ed. 1140 (1954); Shusan v. United States, 117 F.2d 110, 113 (5th Cir.), cert. denied, 313 U.S. 574, 61 S.Ct. 1085, 85 L.Ed. 1531 (1941). Participation in a theft may be inferred from the possession of recently stolen goods. United States v. DeSisto, 329 F.2d 929, 935 (2d Cir.), cert. denied, 377 U.S. 979, 84 S.Ct. 1885, 12 L.Ed.2d 747 (1964). *See* Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed. 380 (June 18, 1973).

[4] The trial court properly allowed the testimony of Simonian and Stolfi at trial. The fact that they refused to make an identification then did not take away from their prior photographic identification. Simonian had selected Kaylor's photograph from a book of some 100–150 photos the very day he had seen "Shorty." Subsequently two photos (including the one previously selected) were included in a spread of nine from which both Simonian and Stolfi selected one, a front and side photo. There is no indication that there was impermissible suggestiveness despite the presence of two photos in the spread since the appearance of the photographed individual was apparently sufficiently different as to cause each of the two witnesses to select only the one photo. *Cf.* United States ex rel. Johnson v. Department of Correction, 461 F.2d 956 (2d Cir. 1972); United States v. Magnotti, 454 F.2d 1140 (2d Cir. 1972). Their testimony was guarded, to be sure, for reasons previously stated, but it cannot be said, as appellant claims, that the witnesses never really identified even the picture of Kaylor as the "Shorty" with the meat.

[5] Appellant Kaylor complains that the court should not have admitted his statements to the FBI Special Agent made after Miranda warnings but in the absence of the attorney requested by Kaylor. But the statements or admissions were volunteered—one that "If I get uptight enough I can tell all about this case" and the other "I know about those two guys in the meat market and they should never have paid the police the $500." The first was made before Kaylor asked for an attorney and the second was volunteered after the Special Agent had concluded his background information interview. As such, neither Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), nor Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) is applicable. United States v. Gaynor, 472 F.2d 899 (2d Cir. 1973); United States v. Garcia, 377 F.2d 321, 324 (2d Cir.), cert. denied, 389 U.S. 991, 88 S.Ct 489, 19 L.Ed.2d 484 (1967).

[6,.7] Appellant Hopkins complains that the court permitted the trucker, Wolverton, to return to the stand and make an identification which he had not made in the first instance; the objection is based upon the suggestiveness of the situation since—had the defendant known there was going to be identification testimony—he would have moved (and the court stated that it would have granted such a motion) to have the defendant seated away from the counsel table. As it was, the identification of Hopkins amounted to a "show-up," but a "show-up" is not per se inadmissible or violative of due process, depending rather upon the totality of the circumstances, Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). It is quite apparent that the omission to adduce identification testimony from the witness on his first trip to the stand was a result of lack of preparation on

the part of the prosecution ("we felt he could [not] identify them in court"), rather than to any bad faith, or an attempt to produce a show-up. United States v. Famulari, 447 F.2d 1377 (2d Cir. 1971). Here the witness, after he left the stand, volunteered to Detective Flynn that he had recognized the appellants as the hijackers. The court quite properly conducted a hearing in the jury's absence to determine whether there were taint by virtue of the viewing of the defendants for the first time in the courtroom, and satisfied itself that the witness was "forthright" and his testimony positive. He had had, he had previously testified, a minute and a half to see the hijackers at the time of the robbery, and his description of the appellants was accurate. The prosecution could have been forewarned, since the witness himself apparently thought he could make an identification, but its omission to ask the key questions, we believe as did the court below, was inadvertent.

We emphasize, in holding that there was not reversible error here, that there is not the slightest suggestion that the prosecution was in any way attempting to bring the confrontation about in the fashion that it occurred.

[8] Appellant Hopkins seeks to have his conviction remanded for resentencing however, because the trial court made no affirmative *explicit* finding that appellant would "not derive benefit from treatment" under the Youth Corrections Act, 18 U.S.C. § 5010(d). This issue, unresolved in this circuit, *see* United States v. Guzman, 478 F.2d 759, 762 (2d Cir. 1973), has recently received en banc consideration in two other circuits. In Cox v. United States, 473 F.2d 334, 337 (4th Cir. 1973) (en banc), the Fourth Circuit stated that the "Youth Corrections Act must be used unless the sentencing judge finds that treatment under the Act would not be beneficial. That finding should be based upon reason . . . ." The Fourth Circuit, although remanding *Cox* to the district court for an explicit finding under § 5010(d) indicated that such a finding could be implied from a sufficient record. 473 F.2d at 337. A panel of the Ninth Circuit held that an implicit finding under § 5010(d) was sufficient; it nevertheless ordered the trial court to make a more explicit finding under that section upon remand. United States v. Jarratt, 471 F.2d 226, 230 (9th Cir. 1972). In United States v. Coefield, 476 F.2d 1152 (D.C.Cir. 1973) (9–1 decision, en banc), however, the District of Columbia Circuit held, *inter alia*, that "the finding required to be made under section 5010(d) as a condition to an adult sentence is to be explicit . . . ." *Id.* at 1158–1159.

[9] My brethren go with *Cox* and *Jarratt* essentially in holding that an *implicit* finding is all that is required. They view—quite properly I think—that this record contains such an implicit finding in Judge Rosling's stating before verdict that he "always take[s]" youth offender eligibility "into consideration when sentence is to be imposed" and in the sentencing minutes in the course of which appellant Hopkins' counsel referred to the Youth Corrections Act and the court said, "In imposing sentence, which is not a light one, I have taken into account the fact that you were quite young at the time you committed the crime."

I disagree with this view and would as did the District of Columbia Circuit in *Coefield*, require an *explicit* finding. *See* 476 F.2d at 1158–1159. It is true that an omission to make an explicit finding is one more threshold to proper sentencing over which a district judge might trip. On the other hand, under the majority holding there may be quite a bit of appellate litigation over what is "implicit." The purpose to be served by the Youth Corrections Act, moreover, seems to me to require not only that there be an explicit finding in so many words that "the youth offender will not derive benefit from treatment," but also, as the District of Columbia court held, that the finding "must be supported by reasons from which it can be determined

that it [the finding] is consistent with the purposes of the Act." 476 F.2d at 1159 (footnote omitted). It is my view that the judge here sentenced on the basis of the aggravated nature of the crime, a matter which does not go at all to the question of benefit from treatment under the Act.

[10] The majority necessarily is of the view that there was no error in the trial court's failure to consult with the sentencing panel in the Eastern District on the basis that the function of the nonsentencing judges on the panel is purely advisory, however helpful it might be. United States v. Brown, 470 F.2d 255, 259 (2d Cir. 1972). I would not reach that question since I would remand for an explicit finding under the Youth Corrections Act.

Judgments affirmed; OAKES, J., dissents from the affirmance as to appellant Hopkins and would reverse and remand for resentencing.

CERTIFICATE OF SERVICE

January 16, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Jonathan Lubbermann